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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

WMCA, INC., R. PETER STRAUS, JOSEPH DEMAIO, EDWARD LIND, S. THOMAS DELANEY, EDWARD C. BROWN, JAMES J. McCAFFERTY,

Plaintiffs-Appellants,

and

PAUL R. SCREVANE, President of the City Council of the City of New York; EUGENE H. NICKERSON, County Executive, Nassau County; and MAURICE J. O'ROURKE, JAMES POWER, Commissioners, Board of Elections, New York City,

Supporting Defendants-Appellants,

against

JOHN P. LOMENZO, Secretary of State of the State of New York; LOUIS J. LEFKOWITZ, Attorney General of the State of New York; FRANCIS X. O'ROURKE, Chairman, Board of Supervisors, Westchester County; WILLIAM J. LEONARD, Chairman, Board of Supervisors, Suffolk County; and JOHN R. CREWS, THOMAS MALLEE, Commissioners, Board of Elections, New York City,

Defendants-Appellees,

and

JOHN H. HUGHES and LAWRENCE M. RULISON,

Intervening Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM

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v.

JOHN P. LOMENZO, Secretary of State of the State of New York, *et al.*,

Appellees.

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Appellees Louis J. Lefkowitz and John P. Lomenzo, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move to dismiss on the ground that the appeal is not within the jurisdiction of this Court, or, in the alternative, to affirm on the ground that the questions presented are so insubstantial as not to merit further argument.

STATEMENT

In December 1964 the New York State Legislature, as a result of the decision of this Court in *WMCA, Inc.* v.

Lomenzo, 377 U. S. 633, and an order of the District Court dated July 27, 1964, enacted four successive and alternative reapportionment Plans. By orders of January 26, 1965 and February 16, 1965, and a decision dated February 1, 1965, the District Court held that one of the Plans (Plan A) fulfills the requirements of the Federal Constitution, but invalidated the other three (Plans B, C and D). Appellees herein filed a Jurisdictional Statement in this Court on April 23, 1965 (October Term, 1964, No. 1099), appealing from so much of the District Court's orders as invalidated Plans B, C and D. Appellants herein filed a Joint Jurisdictional Statement on April 26, 1965, appealing from so much of the District Court's orders as upheld Plan A. This motion is addressed to that appeal.

On April 14, 1965, the New York State Court of Appeals held, in *Matter of Orans,* 15 N. Y. 2d 339, that Plan A violates one of the provisions of the prior New York apportionment scheme which was invalidated by this Court in the *WMCA* decision. A Notice of Appeal to this Court from the judgment of the New York State Court of Appeals was filed on May 5, 1965.

As a result of the foregoing decisions, New York State was faced with a situation in which the District Court had ordered a special election for the Fall of 1965, but the State court had invalidated the only apportionment statute (Plan A) which the District Court had previously found to be in compliance with the Federal Constitution. On May 10, 1965, the District Court directed that the 1965 election take place pursuant to Plan A as a stop-gap measure, and its order to this effect was entered on May 24, 1965.

The Joint Jurisdictional Statement herein asserts that it is merely being "filed by appellants in order to preserve their rights to challenge the validity of . . . [Plan A]

as violative of the Fourteenth Amendment." (J. S. at 3.)* It states that appellants expect to move to dismiss or affirm with respect to the appeals taken from the District Court's invalidation of Plans B, C and D, but that in the event this Court should note probable jurisdiction of that appeal, this appeal from the decision upholding Plan A would also be appropriate for the Court's consideration. (J. S. at 4.)

Appellants thus appear to be appealing on a conditional basis. Absent the noting of probable jurisdiction of the appeal relating to Plans B, C and D, appellants apparently do not propose to prosecute this appeal with respect to Plan A. Such an assertion of rights hardly demonstrates belief in the substantiality of this appeal.

ARGUMENT

I. Appellants' Allegations of Partisan Gerrymandering Do Not State a Claim upon Which Federal Relief Can Be Granted.

The District Court held that appellants' allegations of partisan gerrymandering in the New York reapportionment statutes did not raise questions under the Fourteenth Amendment to the United States Constitution. The District Court was clearly right in this determination, and the question does not merit further consideration by this Court.

The District Court's disposition of this issue was correct because (1) claims of partisan gerrymandering do not meet the criteria laid down by this Court for justiciability; and (2) even if the allegations of partisan districting had been established—which, of course, is not the case here—there would be no violation of the Fourteenth Amendment.

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*Citations to "J. S." refer to appellants' Joint Jurisdictional Statement herein.

A. Claims of Partisan Districting Are Non-Justiciable.

Appellants' contention that the New York Reapportionment Compliance Act gerrymanders the State for partisan, political advantage does not present a justiciable issue. Justiciability is lacking because the question is clearly "political" in nature, and satisfactory criteria are lacking for its judicial determination. The Court is asked "to enter upon policy determinations for which judicially manageable standards are lacking." *Cf. Baker* v. *Carr,* 369 U. S. 186, 226 (1962).

This Court stated in part, in *Baker* v. *Carr,* 369 U. S. at 217, as its test for determining whether malapportionment of State legislatures presented a non-justiciable political question:

> "Prominent on the surface of any case held to involve a political question is found . . . a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion . . . ."

These criteria of non-justiciability clearly apply to questions as to gerrymandering. A claim that a judicially enforceable constitutional right exists necessarily implies that there are principles or rules derivable from the Constitution by which the validity of the claim can be judged, and which can be used in devising an effective remedy. There are, however, no judicially discoverable standards to be derived from the generalized guarantee of the Equal Protection Clause by which the courts may determine the proper shape of legislative districts. If such standards are to be devised, they will necessarily involve initial policy determinations of a legislative rather than a judicial nature.

From time to time various legislative standards designed to curtail partisan gerrymandering have been written into Federal statutes, *e.g.*, 37 Stat. 13 (1911), and State statutes or Constitutions, including portions of New York's prior apportionment scheme, Article III, §§ 4 and 5 of the New York Constitution. Such standards and the drawing of district lines pursuant to them must be derived from complex decisions seeking to accommodate competing State interests and, therefore, necessarily require an arbitrary resolution of conflicting policies and an exercise of legislative discretion.

Standards formulated to curtail gerrymandering are far different from those judicially applied, under the Equal Protection Clause, to malapportionment. As this Court has held, the Equal Protection Clause can be judicially interpreted to mean that State apportionment laws must provide equality of voting strength among voters. No such standard of equality exists, however, for judicially determining the shape of a legislative district. As stated in the Report of the New York Joint Legislative Committee on Reapportionment, dated December 15, 1964, at p. 6:

> "The plain fact is that the 47,929 square miles comprising the State of New York do not form the simple symetry of a checkerboard. Nor are the people of this State distributed among the counties on an equal population basis. Neither the geography, the topography nor the dispersion of the people of the State permit the creation of districts carved out with the neat precision of a cookie cutter."

This Court has been willing to review claims of racially motivated districting because of the express constitutional mandate of the Fifteenth Amendment that: "The right of citizens of the United States to vote shall not be denied or

abridged by the United States or by any State on account of race, color, or previous condition of servitude." The Court's decisions in such cases have been predicated solely on the specific requirements of the Fifteenth Amendment, and not on the Equal Protection Clause.

Thus, in *Gomillion* v. *Lightfoot,* 364 U. S. 339 (1960), the Court held that it was a violation of the petitioner's rights under the Fifteenth Amendment to district the town of Tuskegee, Alabama in such a way as to deny absolutely the right of the town's Negro population to vote in municipal elections. On the issue of justiciability, the Court held, 364 U. S. at 346-347:

> "When a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment. In no case involving unequal weight in voting distribution that has come before the Court did the decision sanction a differentiation on racial lines whereby approval was given to unequivocal withdrawal of the vote solely from colored citizens. *Apart from all else, these considerations lift this controversy out of the so-called 'political' arena and into the conventional sphere of constitutional litigation."**

With respect to partisan districting, there is no express mandate such as the Fifteenth Amendment on behalf of the members of political parties. Moreover, since voters change their mind, unlike their race, there is not even a "readily isolated segment" of any political minority to simplify the determination and application of proper districting standards. Thus, unlike *Gomillion,* there is here no basis

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*Except as otherwise indicated, emphasis in quotations throughout this motion is supplied.

for lifting partisan gerrymandering controversies out of the political arena and into the area of constitutional litigation.

In the present case, the appellants apparently want this Court to write into the Fourteenth Amendment a set of specific standards to govern legislative districting, including requirements that districts be "convenient and compact" and adhere to "natural geographic and political subdivision boundaries." (J. S. at 3, question 2(a).) Such requirements are nowhere to be found in the language or history of the Fourteenth Amendment. They are not judicially discoverable and manageable standards, derived from the language of the Constitution, which the Federal courts are equipped to enforce in constitutional litigation. They are not the arithmetic standards utilized by the Court in evaluating the compliance of apportionment schemes with Equal Protection requirements.

The adoption of constitutional requirements of compactness and "convenience" of legislative districts, sought by the appellants, would not necessarily prevent partisan gerrymandering, which can be accomplished notwithstanding adherence to such requirements. Moreover, such requirements would present serious practical difficulties of enforcement. Topographical features such as hills, forests, bodies of water, transportation arteries, parks and business and industrial areas do not lend themselves to such requirements. In addition, such requirements are frequently inconsistent with competing standards such as adherence to political subdivisions, and the overriding requirement of equality of population among districts.

The other constitutional standard sought by the appellants, namely, adherence to "natural geographic and political subdivision boundaries," would also present serious

policy questions and difficulties of judicial enforcement. How are the Courts to determine from the Equal Protection Clause which subdivisions, i.e., counties, cities, towns, villages, or others, should comprise the district lines, and which should take priority in the event of conflict as between requirements for adherence to political subdivisions and competing requirements with respect to compactness, contiguity or population equality?

Moreover, standards adaptable to one State may be wholly inappropriate in another; and, in any event, with the several possible standards likely to conflict with each other in varying degrees from State to State, the adoption of such standards is best left to the policy determination of individual State legislatures.

This Court has recognized the possibility of a legitimate State interest in maintaining the integrity of political subdivisions insofar as possible, as well as providing for compact and contiguous districts. *Reynolds* v. *Sims,* 377 U. S. 533, 578-579 (1964). Recognition of this legitimate State interest, however, scarcely suggests a Federal constitutional mandate with respect to partisan districting.

Judicial remedies for gerrymandering are readily available in New York. Article III, Section 5, of the New York State Constitution provides:

> "An apportionment by the legislature, or other body, shall be subject to review by the supreme court, at the suit of any citizen, under such reasonable regulations as the legislature may prescribe; and any court before which a cause may be pending involving an apportionment, shall give precedence thereto over all other causes and proceedings, and if said court be not in session it shall convene promptly for the disposition of the same."

The utilization of this State remedy is demonstrated by *Matter of Richardson (Stark)*, 307 N. Y. 269 (1954), and the other New York gerrymandering cases there discussed. These New York cases illustrate, however, the difficulties in the judicial regulation of gerrymandering even when the courts were enforcing specific legislative standards.

The Federal judiciary, if it seeks to review the shape of State legislative districts, will assume an almost impossible burden. In large States such as New York, comprised of scores or even hundreds of legislative districts, it is inconceivable that the most dispassionate districting would not permit someone to make a persuasive argument that he has been politically disadvantaged. A judicial determination with respect to the shape of one district would not bar a suit by a resident of another district in the same State in respect of the same districting plan. Federal districting cases, if permitted at all, seem certain to be legion.

Moreover, if the courts attempted to review legislative districting they would enter a hopeless morass, in which they would be required to weigh map changes, shifting population densities, topographical constants and variables, competing considerations relevant to various political subdivisions, evidence of legislative motivation, and the interrelationship of all of these factors with respect to adjacent and neighboring districts. This is particularly true in a case like the present one, which challenges generally the entire districting of the State. Although apportionment cases lend themselves to a determination by a ready application of available statistics, districting cases would require value judgments among many competing variables, the strength of which would vary from case to case.

Such an unnecessary and inappropriate drain on the resources of the judiciary does not seem in the interest of

our legal system. Absent legislative standards of districting, it cannot profit the administration of justice to require the Federal courts, and particularly this Court, to form an essentially visceral reaction to each of the thousands of districts periodically subject to challenge throughout the 50 States.

B. Partisan Districting Does Not Violate the Equal Protection Clause of the Fourteenth Amendment.

The District Court followed established Federal law when it held that alleged gerrymandering of the New York State legislative districts, even if proved, would not violate the Equal Protection Clause. For this Court now to hold otherwise would be contrary to previous decisions, and to the history and purpose of the Equal Protection Clause.

It would be particularly unfortunate for this Court to enunciate a federally protected right against partisan districting in the context of a stop-gap reapportionment statute such as Plan A, enacted only as a temporary measure until a State constitutional apportionment amendment can be adopted.

This Court has never recognized a federally protected constitutional right against partisan districting. In *Wood* v. *Broom,* 287 U. S. 1 (1932), the Court refused to invalidate certain congressional districts in Mississippi. The petitioners charged that *an absence of compact, contiguous districts* violated the Equal Protection Clause (Transcript of Record, pp. 9-10), as well as Article I, Section 4 of the Federal Constitution and an expired 1911 Federal redistricting statute which had contained a specific requirement of compact, contiguous congressional districts. The Court

held that it was the intention of Congress in a subsequent 1929 reapportionment statute not to re-enact the statutory requirement of compact, contiguous districts. The Court did not even discuss the claim that such a requirement was imposed by the Equal Protection Clause. If that Clause had been considered by the Court to contain any basis for relief, the Court's determination that the Federal districting statute had expired would not have ended the Court's inquiry. No reason appears why the Equal Protection Clause should provide any greater relief with respect to State legislative districts than it did in the *Wood* case with respect to congressional districts.

As previously indicated, in the racial districting case of *Gomillion* v. *Lightfoot, supra,* the Court determined that Federal relief was available solely on the basis of the Fifteenth Amendment, although the petitioners asserted rights under the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Mr. Justice Whitaker, concurring, would have relied on the Equal Protection Clause, but the Court declined to invoke that provision even as to racial districting.

In *Wright* v. *Rockefeller,* 376 U. S. 52 (1964), although the appellants again pleaded the Fourteenth Amendment as well as the Fifteenth Amendment, the Court upheld the decision of the court below that the appellants had failed to prove that the apportionment of four congressional districts in New York City was improperly motivated by racial considerations, again solely pursuant to the express mandate of the Fifteenth Amendment.

In *Honeywood* v. *Rockefeller,* 376 U. S. 222 (1964), appellants alleged political gerrymandering as well as racial "gerrymandering." In dismissing the complaint, the District Court had stated, 214 F. Supp. 897, 902-903 (E.D.N.Y. 1963):

> "We are asked to wend our way through the streets of Brooklyn and across the Narrows to Staten Island and to conclude at the end of our journey that there is something unconstitutional lurking along the way. But the only thing we can be certain of is that a reduction in New York's Congressional seats was necessary, that the Legislature endeavored to create comparative equality of population in the state districts and that this was duly accomplished. Any other conclusion would be mere speculation. The process of prediction in the political area is fraught with difficulties, to which many unsuccessful candidates can most eloquently testify."

This Court affirmed the District Court's decision *per curiam,* solely on the basis of the *Wright* case, *supra,* despite the claim of partisan gerrymandering.

It is abundantly plain from historical materials that neither those who drafted the Fourteenth Amendment, nor the State Legislatures that ratified it, intended or contemplated that it would have application to the shape of legislative districts.

Partisan gerrymandering may, of course, place some members of a political party at a disadvantage. As this Court made clear, however, in *McGowan* v. *Maryland,* 366 U. S. 420, 425-426 (1961), not every disadvantage, intended or otherwise, amounts to a constitutionally proscribed inequality.

Under the one-man, one-vote principle the vote of every citizen goes the same distance towards electing (or failing to elect) a legislator as the vote of every other citizen of the State. This is true whether or not partisan districting exists. Where legislators are elected from districts by majority vote, 26% of the voters may elect 51% of the Legislature. This, too, is true whether or not partisan districting exists.

No one's vote is diluted by gerrymandering. No one's vote is debased. If the complaining voter has been consolidated with a large number of like-minded voters into a single district, he will probably have voted for a winning candidate. In such event he can only complain hypothetically that if he had been placed in some other district he might have voted for some other winning candidate. Under another form of gerrymandering a voter and his co-partisans may have been dispersed among several districts so that he is likely to vote for a losing candidate. That voter can only complain that if he had been placed in some other district he might have been more likely to vote for a winning candidate. In the absence of proportional representation someone always votes for a losing candidate.

This Court, quite obviously, cannot set quotas for registered party members in the State election districts; yet this, in effect, is what it would be doing if undertook to determine that the party mix in any district or districts was improper.

In the reapportionment decisions, it was not the interests of one political party or another that the Court sought to protect. Rather, it was the interests of voters as such, in all the areas of the State, whether they belonged to a majority party or a minority party. Legislators presumably represent their constituencies regardless of their party affiliation. On the other hand, voters' party affiliations change; and our history is replete with evidence that the more important the choice between the particular issues or candidates, the more meaningless the party label becomes. With good reason the Federal Constitution has not required particular allocations of political party populations among districts.

II. Legislative Apportionment on the Basis of Citizen Population Is Clearly Constitutional.

The Notice of Appeal of appellant Nickerson raises, as one of the questions presented by the appeal, whether Plan A of the New York State Reapportionment Compliance Act "is invalid under the Fourteenth Amendment of the United States Constitution in that the apportionment is based upon citizen population." This question is not repeated in appellants' Joint Jurisdictional Statement, although Question 3 in that document asks generally whether Plan A is "invalid as a violation of the Fourteenth Amendment." It is thus not clear whether appellants have abandoned their constitutional challenge to the citizen-population apportionment base used in Plan A. It is perfectly apparent, however, that any such challenge does not raise a substantial question.

Preliminarily, a serious question arises as to what standing any of the appellants has to challenge the citizen base, since none has alleged that he is not a citizen and is thereby aggrieved by the citizen base. *Baker* v. *Carr*, 369 U. S. 186, 204-208 (1962); *Tileston* v. *Ullman*, 318 U. S. 44 (1943).

Furthermore, any challenge to the citizen population base in the present case raises at best an academic question, since the District Court found as a fact, 238 F. Supp. 916, 925:

> "... a change from the citizen base to a resident base for legislative apportionment would have but little impact on the densely populated areas of New York State ... It would appear that New York's use of its traditional citizen population base, rather than a novel resident population base, affects all areas of the State substantially equally."

The citizen population base was written into the scheme of apportionment contained in the New York Constitution, adopted in 1894 (Article III, Sections 4 and 5), and was used even prior to that time. Although the present case was first brought in 1961, and has twice previously been argued before this Court, the constitutionality of the citizen base was never questioned prior to this challenge to the Reapportionment Compliance Act of December 1964, as amended, in which two of the Plans continue to employ the citizen base.*

The validity of the citizen base under the Equal Protection Clause is abundantly clear from this Court's reapportionment decisions. As the District Court noted, in upholding the citizen base in Plan A, 238 F. Supp. at 925:

> ". . . a crucial passage in Reynolds v. Sims, supra, 377 U. S. at 577, 84 S. Ct. at 1389, convinces us that 'population' may mean the total number of citizens as well as the total number of residents. The Supreme Court stated:
>
> > '[T]he Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable.

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*Citizen population also provides the apportionment base for one or both houses of the legislatures of Maine, Nebraska, and North Carolina. MAINE CONSTITUTION, Art. IV, Pt. I, §§ 2, 3, Pt. II; NEBRASKA CONSTITUTION, Art. III, § 5; NORTH CAROLINA CONSTITUTION, Art. II, §§ 4-6. In addition, only those citizens who are registered voters have comprised the apportionment base for one or both houses of the legislatures of Massachusetts, Rhode Island, Tennessee, Texas, Arizona and Hawaii. MASSACHUSETTS CONSTITUTION, Amend. LXXI; RHODE ISLAND CONSTITUTION, Amend. XIX; TENNESSEE CONSTITUTION, Art. II, §§ 4-6; TEXAS CONSTITUTION, Art. III, § 25; ARIZONA CONSTITUTION, Art. IV, Pt. 2, § 1; HAWAII CONSTITUTION, Art. III, §§ 2-4.

> We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of *residents, or citizens, or voters.* Mathematical exactness or precision is hardly a workable constitutional requirement.' (Emphasis supplied)."

This Court also stated in *Reynolds,* 377 U. S. at 579:

> "Whatever the means of accomplishment, the overriding objective must be substantial equality of population among the various districts, so that the vote of any *citizen* is approximately equal in weight to that of any other *citizen* in the State."*

Similarly, in its prior consideration of this case, in *WMCA, Inc.* v. *Lomenzo,* 377 U. S. at 653, the Court stated:

> "However complicated or sophisticated an apportionment scheme might be, it cannot, consistent with the Equal Protection Clause, result in a significant undervaluation of the weight of the votes of certain of a State's *citizens* merely because of where they happen to reside."

In line with these pronouncements by the Court, a principal reason underlying the Legislature's adoption of the citizen population base in Plan A was the conclusion of the Citizens' Committee Report, at p. 12, that:

> "Sections 4 and 5 of Article III of the New York State Constitution provide for the apportion-

*Similar statements are contained in the *Reynolds* decision at pp. 534, 555, 556, 562, 563, 564 n. 41, 565-566, 567, 568, 576, 580, 581. See also *Baker* v. *Carr,* 369 U. S. at 208.

> ment of seats in the Legislature on the basis of citizen population. The Supreme Court, in *WMCA,* noted the State Constitution's exclusion of aliens from the population base, but did not make any adverse comment on this point. It would appear, therefore, that the continuance of the alien exclusion would raise no questions under the State and Federal Constitutions."

While a voter population base appears best to effectuate the one-man, one-vote principle, a citizen population base clearly comports more closely with that principle than the resident population base for which appellant Nickerson appears to be contending.* In accordance with the practice of the States generally, the New York Constitution (Article II, Section 1) grants the franchise only to citizens. Thus, in any State in which the choice between a resident base and a citizen base would produce a substantially different result, apportionment on a basis which includes non-citizens who cannot vote would have the same effect as weighting the votes of some voters more heavily than the votes of others. Only those who possess the franchise can be protected in its exercise.

In sum, the use of a citizen base is clearly constitutional, and the District Court found that its use is without significant practical consequence in this case. Any challenge to the citizen population base raises no question of substance, and merits no further consideration by this Court.

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*See Jurisdictional Statement in *Lomenzo, et al. v. WMCA, Inc., et al.*, October Term, 1964, No. 1099, at pp. 23-30, filed on April 23, 1965. The Report of the New York Joint Legislative Committee on Reapportionment, dated December 15, 1964, concluded, at p. 8, that "the use of citizens as a population base offers the only real alternative to the use of voters as the measure of population."

CONCLUSION

For the reasons stated the appeal should be dismissed, or, in the alternative, the judgment below should be affirmed with respect to the issues raised by this appeal.

Respectfully submitted,

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